In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 1570

ROBERT H. DONNELLY,
PETITIONER,

v.

BENJAMIN A. DeCHRISTOFORO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the Court of Appeals is reported at 473 F.2d 1236 (A. 236). The order of the district court (A. 231) is not reported. The opinion of the Massachusetts Supreme Judicial Court (A. 149) is reported at 1971 Mass. Adv. Sh. 1707, 277 N.E.2d 100 (1971).

Jurisdiction

The judgment of the court below was entered on February 22, 1973. The petition for a writ of certiorari was filed on May 23, 1973 and was granted on October 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether the lower court erred in concluding that the statements made by the prosecutor in his closing argument were so seriously prejudicial as to deny the respondent his rights under the Fourteenth Amendment to the Constitution?

Constitutional Provision

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

A. *Proceedings in the State Courts*

On May 8, 1967, a Middlesex County grand jury returned two indictments against Respondent Benjamin A. DeChristoforo. Indictment number 77689 charged DeChristoforo with having committed murder in the first degree of one

Joseph Lanzi. Indictment number 77690 charged DeChristoforo with illegal possession of a firearm. At respondent's arraignment on November 20, 1968, a plea of not guilty was entered in his behalf at the direction of the court. The trial of respondent commenced on April 22, 1969, and lasted seven days.

The first Commonwealth witness, Patrick Carr, a Medford, Massachusetts police officer, testified that at approximately 4:00 a.m. on April 18, 1967, while accompanying Officer John P. Brady in a police cruiser, he observed an automobile with four occupants and approached it to investigate (A. 13-16); that the operator of the vehicle, one Gagliardi, stepped out as he (the witness) approached (A. 16); that a man, later identified as the deceased Lanzi, appeared to be asleep in the front passenger seat of the car with his head slumped back and to the left (A. 17); that Frank Oreto and the respondent were in the back seat of the car and that they each conversed with him (the witness) when they got out of the car (A. 18-19); that the respondent identified himself with a surname other than "DeChristoforo" (A. 19); that the respondent identified the man remaining in the vehicle (Lanzi) as "Johnny Simeone from Boston" (A. 20); that the respondent indicated that the man "sleeping" in the front seat had been "involved in a fight in a joint in Revere" and that they (the occupants of the car) were going to take the other occupant (the deceased Lanzi) to a hospital (A. 20).

Officer Carr testified further that DeChristoforo walked away from the car while Officer Brady shined a light into the car and reportedly observed a small derringer-type gun on the floor behind the driver's seat and a revolver on the seat where Frank Oreto had been seated previously (A. 20);[1] that he (the witness) leaned into the car to examine the

[1] The guns were subsequently introduced as exhibits in the case (Tr. 381-83). "Tr." refers to State Trial Transcript.

supposedly injured man and determined that he was bloody and not breathing; that Officer Brady likewise examined the man and determined that he was dead (A. 20-21). Frank Oreto was arrested at the scene (A. 21). (On October 26, 1967, Oreto, the only suspect then in custody, pleaded guilty to second degree murder and illegal possession of a firearm. See 1971 Mass. Adv. Sh. 1708 (A. 150).)

On cross-examination Officer Carr testified that DeChristoforo had been seated behind the driver in the automobile and that Oreto had been seated behind the dead man (A. 26).

George Katsas, a pathologist, then testified that he had examined the victim's body and had extracted bullets therefrom at approximately 5:30 a.m. on April 18, 1967 (A. 33-35); that four bullets had been found in the victim's body (A. 36); that in his (the witness') opinion the victim, Lanzi, had died as a result of multiple gunshot wounds in the chest and head which perforated the brain, liver and lungs (A. 38); that smoke rings indicated that a gun was held close to, or in contact with, the clothing and body at the time of the shots (A. 39); that death had occurred between three and five o'clock in the morning, probably nearer to four a.m. (A. 40) and that, in his opinion, the victim had been shot to death in the automobile (A. 40).

On cross-examination, the witness testified further that it was his opinion that the body had not been moved after the shooting (A. 43).

Officer John P. Brady testified that he was the police officer who was with Officer Carr during the night in question; that he (the witness) saw an automobile go through a red light (A. 48); that the car contained four men and that the headlights on the car were off (A. 48-50); that he observed Gagliardi get out of the driver's door; that he heard Officer Carr converse with Gagliardi (A. 50)

and that he walked to the rear of the car and heard a conversation between Officer Carr, Frank Oreto and the respondent, DeChristoforo (A. 54-57).

William Modugno testified that he lived at 9 Fourth Street in Medford (previously established as in the area where the two police officers questioned the respondent) and that, on July 25, 1967, he found a revolver buried in the backyard of his home (A. 62-63).[2]

Walter Dello Russo testified that he was a bartender at the Attic Lounge in Boston; that DeChristoforo was his employer (A. 65-66); that Oreto was the manager of the cocktail lounge downstairs but worked in both places (A. 66-67); that he (the witness) knew the deceased Lanzi; and, that both DeChristoforo and Oreto were in the Attic Lounge at two o'clock on the morning of April 18, 1967 (A. 68).

Susan Morrison, a secretary at Harvard University, testified that she saw DeChristoforo and Gagliardi at the Attic Lounge early in the morning on April 18, 1967 (A. 70-72).

William F. Cummings, a Massachusetts State Police ballistician, testified that he had received two weapons from the Medford Police on April 18, 1967, and had examined the same (A. 74); that he had examined bullets removed from the body of Joseph Lanzi and had performed tests thereon (Tr. 684-85); that, in his opinion, the bullet removed from Lanzi's head had been fired by the revolver that had been found on the back seat of the car (A. 77); and that, in his opinion, the three bullets taken from Lanzi's chest cavity had been fired from the gun previously identified as having been found buried in the backyard of William Modugno (A. 77, 78-80).

Edmund Flanagan, a special agent for the Federal Bureau of Investigation, testified that pursuant to the issu-

[2] The weapon was introduced as an exhibit (Tr. 597).

ance of an unlawful flight warrant he had been involved in the nationwide search for DeChristoforo following the respondent's disappearance on April 18, 1967, and that DeChristoforo had been arrested finally on November 20, 1968, after an extensive investigation by the Federal Bureau of Investigation (Tr. 724-27).

Dennis M. Condon, also a special agent of the Federal Bureau of Investigation, testified as to his experiences attempting to apprehend Gagliardi, co-defendant of the respondent (Tr. 735-41). The trial judge gave a limiting instruction as to the effect of this testimony (Tr. 736) at the request of respondent's attorney (Tr. 275-77, 722).

Counsel for respondent thereupon proceeded to make an opening statement to the jury. During that address, counsel stated that evidence *would be offered* to show that the respondent had been in the car because it was a rainy night and he needed a ride home (Tr. 760); that evidence *would be offered* to establish that respondent's flight from the authorities could be explained on some ground other than "consciousness of guilt" (Tr. 760-61); that evidence *would be offered* to show that DeChristoforo "was only a passenger in an automobile where an incident took place over which he had no control and had no interest in, other than the death of his close friend" (Tr. 761).

The defense case-in-chief contained *no* evidence supportive of any of the above-cited contentions made by defense counsel in his opening statement.

Nevertheless, defense counsel reiterated in closing argument *his unsupported contentions* that the respondent was in the car simply for the purpose of getting a ride home (A. 113) and that the respondent's flight was consistent with something other than consciousness of guilt.

At the close of all of the evidence, while the jury was not present, the respondent's co-defendant, Gagliardi,

pleaded guilty to murder in the second degree (A. 98). After the jury returned, the court stated:

> Mr. Foreman, and gentlemen of the jury, you have noted that the defendant Gagliardi is not in the dock. He has pleaded 'guilty' and his case has been disposed of. We will, therefore, go forward with the trial of the case of the Commonwealth v. DeChristoforo... (A. 99).

The trial judge was not requested, at that time, to instruct the jury that Gagliardi's plea should have no effect on its determination of the guilt or innocence of DeChristoforo; no instruction was requested then or given. The fact that the judge advised the jury of Gagliardi's guilty plea and the further fact that respondent's counsel did not request a jury instruction were consistent with respondent counsel's prior attempts to introduce into evidence an exhibit showing that Oreto had already pleaded guilty to the murder of Lanzi and had been sentenced to life imprisonment (Tr. 808, 810-813, 819-822, 825-826). On the question of the admissibility of the Oreto exhibit, respondent's counsel argued to the judge "Well, if the Comonwealth will say [that Oreto pleaded guilty to murder] for the record so that the jury will know it, I will have no quarrel...." (Tr. 820). "If I have an opportunity to prove that [DeChristoforo] didn't personally shoot [Lanzi], at least I can eliminate that from the thinking of the jury." (Tr. 820).

Among other things, respondent's counsel made the following statement in his closing argument:

> There may have been any number of reasons why that man [DeChristoforo] ran away from that place. There was a vicious killing of his friend, and who is to say

that he wouldn't be next. And I submit to you, Mr. Foreman and members of the jury, he didn't go out and hide with hoodlums, he didn't go out and hide with racketeers, he went to his grandmother's house, and he stayed in his grandmother's house and he stayed there—and I submit you have a right to draw inferences that he stayed there out of fear, not out of fear of prosecution, but out of fear for other causes (A. 117).

... It is my function to attempt to call your attention to such matters that have developed during the course of the trial *as I feel will warrant, justify or require you* to return a verdict of not guilty (A. 99).

... What has been offered to get you to start thinking along the lines that Butch [i.e., respondent] and others decided they ought to kill this fellow, this friend of theirs? Nothing, of course. *There has been no evidence offered of any disputes here, of any fights, of any ill feeling, of any ill will* (A. 111)

... So that *I think* it's fair to say that the Commonwealth hasn't demonstrated any evidence that would warrant you to even consider the question as to *whether or not DeChristoforo actually pulled the trigger.*

In short, *I think that you would almost be compelled* to come to the conclusion as reasonable people, that he wasn't the killer (A. 110).

... When I say that it's serious, *I think it's serious* only because *I think* that it creates doubts in your mind rather than creates affirmative evidence against him (A. 110).

> . . . [I]f there is a doubt in your mind about that, and *I believe there is, I represent and argue to you* there is, *I ask* you to find him not guilty (A. 118) (Emphasis added).

The prosecutor's closing argument followed. He began:

> Let me preface my argument by saying that first of all I am aware that what I say really is an argument because the word "argument" presupposes that I am prejudiced to the cause that I represent, which of course I am. I think that the very nature of this system, being adversary, pitting one side against the other, naturally makes you point to those things which you think support your particular position and to more or less ignore those things which I suppose detract from it.
>
> I want you to be aware also that I understand completely that my argument is in no way evidence, all it is, is an attempt, I suppose, to point out to you those things that I think are important in the case with reference to our responsibility and the burden of proof.
>
> And I realize that my closing argument should be in no way considered by you as any evidence in the case, and I am sure that you won't consider it as that; as I am sure that my opening statement to you is in no way evidence in the case and won't be considered by you as evidence.
>
> I think the important thing for me to say to you right now with reference to the opening I made to you, with reference to what we were going to prove: I hope that if there was anything in that opening that I said to you that we did not prove, that you will disregard what I said about it and only make your

> decision on the evidence that we presented to you. I represent to you that whatever I said in the opening I honestly and honorably intended to prove at the time, and I suggest to you that for the most part we have done that without any fear of contradiction.
>
> Let me say by way of getting into my argument that I am aware of what our burdens are in the courtroom, what the Commonwealth's burdens are, what our responsibilities are, and I am aware of the fact that because DeChristoforo has been indicted for the murder and arrested is no evidence of his guilt and I don't ask you to regard it as such. As a matter of fact, you can't. And I realize that our burden is to prove to you beyond any reasonable doubt his guilt." (A. 119-120).

The prosecutor then told the jury that the facts indicated that Gagliardi (the driver) shot Lanzi three times in the side and that Oreto shot Lanzi in the back of the head (A. 123). The prosecutor argued that DeChristoforo was guilty of murder because he was in the car as a confederate of Gagliardi and Oreto—prepared to assist them in any eventuality (A. 131).

During his lengthy closing argument, the prosecutor made the following remarks which have come under attack:

> We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances . . . the defense seems to make some big issue of motive in this case in an attempt, I suppose, to have the jury feel, regardless of what instructions might be given by the court, that an absence of motive in a killing is something that is a detriment to the Commonwealth's case and, therefore, you should sort of equate that to reasonable doubt and then acquit him . . . (A. 120-121).

No objection to the remark was made. Later, the prosecutor argued:

> I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder... (A. 129).

An objection to the remark was sustained; the court indicated its agreement that the statement had been improper (A. 129. See also A. 139) 1971 Mass. Adv. Sh. at 1712 (A. 155). No specific curative instruction was requested immediately; no specific curative instruction was given at that time. [The trial judge later stated that had counsel so requested, he would have given such an instruction (A. 139-140)]. Later, arguing to the jury, the prosecutor said:

> I expect that you will return a verdict that is a reflection of the truth. I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way (A. 130).

No immediate objection was taken by respondent's counsel to this statement; nor was a specific curative instruction requested at that time. Rather, *on the following morning,* after respondent's counsel had reviewed his copy of the daily transcript, said counsel moved for a mistrial on the ground that the last two remarks quoted above had prejudiced his client. The motion was denied, to which denial respondent's counsel excepted (A. 134). The judge went on to invite respondent's counsel to submit in writing whatever instructions counsel desired the judge to give to the

jury in order to counter the alleged prejudicial effect of the prosecutor's remarks (A. 134-136).

Counsel for the respondent then wrote out and filed a specific request for instructions which is included in the Appendix (A. 145).

Immediately prior to the giving of the charge, respondent DeChristoforo exercised his right to make an unsworn statement to the jury (A. 140-142).[3] He stated that he had asked Gagliardi for a ride home; that on the way home an argument broke out of which he had no part; he saw Joseph Lanzi get shot; he couldn't stop it; he was afraid for his life (A. 141).

The trial judge proceeded to instruct the jury, at length. The remarks set out below were included in the court's final charge to the jury:

> ... Let me begin this charge by saying to you that, as I have said with regard to unsworn statements, not subject to cross-examination, of the defendant, it is not evidence, nor are arguments of counsel, nor the opening of counsel—whether it be the Assistant District Attorney in this case or whether it be Mr. Smith. It is not evidence for your consideration.
>
> ... The closing arguments, too, Madam and gentlemen of the jury, the counsel very often becomes overzealous. Closing arguments are not evidence for your consideration. Closing arguments, Madam and gentlemen, are merely statements by the respective counsel as to how they hope you will view the evidence which you have heard.

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[3] Allowing a defendant in a capital case to make an unsworn statement to the jury had been a custom of long standing in Massachusetts. *Ferguson* v. *Georgia*, 365 U.S. 570, 586, fn. 17 (1961). A recent opinion of the Supreme Judicial Court, *Commonwealth* v. *O'Brien*, 1971 Mass. Adv. Sh. 1181, 271 N.E.2d 633 (1971), has apparently put an end to this anomolous practice.

> Now, in his closing argument, the District Attorney, I noted, made a statement: "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." There is no evidence of that whatsoever, of course; of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement was made (A. 143-144).

On April 30, 1969, respondent was found guilty of murder in the first degree. It was recommended that the death penalty not be imposed. He was also found guilty of unlawful possession of a firearm (Tr. 1023-24, 1037). A life sentence was imposed as a result of the murder conviction. A sentence of not less than four years, nor more than five years, was imposed for the lesser conviction, to be served concurrently (Tr. 1037).

The respondent appealed to the Massachusetts Supreme Judicial Court, pursuant to Mass. Gen. Laws c. 278, §§ 33A-G. Additionally, respondent moved for a new trial in the Superior Court, claiming the denial of his constitutional rights as set forth herein. The motion was denied and, upon the respondent's exceptions, that denial became part of his appeal.

The Supreme Judicial Court solidly affirmed the judgment of the Superior Court by a majority vote. *Commonwealth* v. *DeChristoforo,* 1971 Mass. Adv. Sh. 1707, 277 N.E. 2d 100 (A. 149).

B. *Proceedings in the Federal Courts*

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of

Massachusetts on July 7, 1972. Counsel agreed that no facts were in dispute and introduced into evidence the identical record that had been before the Massachusetts Supreme Judicial Court. By order dated September 27, 1972, the District Court judge denied the petition ruling that "the prosecutor's arguments were not so prejudicial as to deprive [DeChristoforo] of his constitutional rights to a fair trial." (A. 231).

On February 22, 1973, by a two to one decision, the United States Court of Appeals for the First Circuit reversed the order of the District Court. (A. 236).

Summary of Argument

I. In this federal habeas corpus proceeding under 28 U.S.C. §2254, the First Circuit erred in determining that the state prosecutor's remarks in summation to the jury violated the Fourteenth Amendment, because, at the very outset, the circuit court, against the tradition and history of the writ, considered a matter of *state* criminal trial procedure in a federal habeas corpus proceeding. This, the petitioner suggests, has violated the principles of *Townsend* v. *Sain*, 372 U.S. 293 (1963), and raised an important matter, but nonetheless a state matter, to the level of a federally cognizable claim. The First Circuit has assimilated its task in this matter as that of a court of appellate review over the highest appellate court of the Commonwealth of Massachusetts.

II. In the event that this Court determines that remarks of a *state* prosecutor can reach constitutional proportions in a federal habeas corpus proceeding under 28 U.S.C. §2254, the remarks made by the state prosecutor in the trial of the instant respondent in the Massachusetts court do not constitute a violation of due process:

(1) The remarks must be viewed in the context of the whole trial proceeding. This is a principle which seems to be established as to *federal* review of *federal* criminal proceedings in the federal *courts*. *Berger* v. *United States*, 295 U.S. 78 (1935); *United States* v. *White*, 14 Cr.L. Rep. 2091 (2d Cir. 1973); *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968). And, petitioner suggests that no greater standard should be applied by a federal court in reviewing a state proceeding.

(2) When the admittedly improper remarks made by the state prosecutor are examined in the context of the entire state trial proceeding, by comparison to the available federal cases, the remarks fall far short of the level of prejudice deemed by this Court and lower federal courts to constitute a violation of due process.

(3) To the extent that the First Circuit in its opinion relied upon *Miller* v. *Pate*, 386 U.S. 1 (1967) and *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967) as authority for determining the prosecutor's remarks in this case to have been violative of due process, the reliance was substantially misplaced, as both *Miller* and *Hamric* dealt with a *deliberate* and *knowing misrepresentation of material evidence* by the prosecutor and are, in petitioner's opinion, clearly and substantially distinguishable from the instant case.

III. The First Circuit determined that on the basis of one remark by the prosecutor in his closing argument, the jury *could* have drawn an inference that the respondent-defendant had offered to plead guilty but that his offer

had been refused. This determination is not only patently unsupported by the actual trial proceeding and the respondent-defendant's obvious trial stategy, but clearly violative of this Court's caution that a showing of essential unfairness must be sustained "not as a matter of speculation but as a demonstrable reality." *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943), quoting *Adams* v. *U. S. ex rel. McCann*, 317 U.S. 269 (1942). In short, the circuit court erroneously elevated a mere possibility of inference to a demonstrable essential unfairness.

IV. The First Circuit violated principles of comity and federalism which underlie the federal habeas corpus statute by imposing its own conception of policy and fairness upon the Commonwealth of Massachusetts as to an alleged error which does not violate any discernible and established principle of federally cognizable constitutional right. In so doing, the circuit court apparently ignored the opinion of this Court in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934), and the perimeters of a constitutionally unfair trial as set forth in *United States* v. *Augenblick*, 393 U.S. 348.

Argument

I. The First Circuit Court of Appeals Erred in Concluding That the Statements Made by the Prosecutor in His Closing Argument Constituted a Violation of the Fourteenth Amendment.

A. *Traditionally, Improper Remarks By A Prosecutor Have Not Been A Proper Subject For Review In A Habeas Corpus Proceeding Under 28 U.S.C. §2254*

The lower federal courts have consistently held that unfair conduct of a state prosecutor falls short of consti-

tuting a lack of due process and is, therefore, not a proper subject for federal review in habeas corpus proceedings under 28 U.S.C. §2254. *Bergenthal* v. *Cady*, 466 F.2d 635 (7th Cir. 1972); *Higgins* v. *Wainwright*, 424 F.2d 177 (5th Cir. 1970), *cert. denied*, 400 U.S. 905 (1970); *Downie* v. *Burke*, 408 F.2d 343 (7th Cir.), *cert. denied*, 395 U.S. 940 (1969); *Castillo* v. *Fay*, 350 F.2d 400 (2nd Cir. 1965), *cert. denied*, 382 U.S. 1019 (1966); *Chavez* v. *Dickson*, 280 F.2d 727 (9th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961).[4]

These courts have based their decisions on the principle that it is not the function of the federal court on habeas corpus to oversee the administration of state court procedure, but only to interfere in the state courts' administration of justice when a fundamental federal right has been violated. *Jackson* v. *People of California*, 336 F.2d 521 (9th Cir. 1964).

The writ of habeas corpus traditionally has been used to safeguard fundamental federally protected rights.

> The whole history of the writ—its unique development —refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review.
>
> The function on habeas is different. It is to test by way of an original civil proceeding, independent

[4] The one exception that appears as a result of petitioner's inquiry is *Pike* v. *Dickson*, 323 F.2d 856 (9th Cir. 1963), *cert. denied*, 377 U.S. 908 (1964). In *Pike* the court did consider the question of whether or not the remarks of a prosecutor were sufficiently prejudicial so as to have deprived the petitioner of a fair trial. However, in *Pike* the prosecutor had stated: that the defendant's counsel would knowingly permit a defendant to commit perjury; that it was the public defender's duty to permit the defendant to tell a lie; and, that the defendant's story was "made out of wholecloth." The court did not, however, answer the question of whether or not prejudice (federally cognizable) had resulted, but held that the error lay in the failure of the court below to adequately inquire into the facts as alleged in the prisoner-drawn petition.

> of the normal channels of review of criminal judgments, the gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution... *Townsend* v. *Sain*, 372 U.S. 293, 311-312 (1963).

While the petitioner acknowledges that the writ has been expanded to review exceptional constitutional claims of denial of due process, (e.g., *Waley* v. *Johnson*, 316 U.S. 101 (1942); *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Moore* v. *Dempsey*, 261 U.S. 86 (1923)) the petitioner submits that the admitted impropriety in this case involves merely a matter of state criminal trial procedure, and the lower federal courts have properly refused to consider such matters in collateral habeas corpus proceedings. The petitioner suggests that the First Circuit abandoned this tradition without substantial justification.

B. *In The Event That This Court Determines That Remarks Of A State Prosecutor Can Reach Constitutional Proportions In A Habeas Corpus Procedure Under 28 U.S.C. §2254, The Remarks Of The State Prosecutor In The Instant Case Do Not Constitute Violation Of Due Process When Compared With Existing Federal Standards.*

Absent direct authority on this point, the petitioner suggests that *federal courts,* in reviewing federal prosecutions in the *federal court,* have provided some guidelines in at least two Circuits with respect to review of prosecutorial impropriety against a Due Process backdrop. In each case, your petitioner submits, the courts have established as a primary guide the principle that the entire proceeding be

reviewed as a whole, rather than examination of an alleged impropriety in a vacuum. *United States* v. *White*, 14 CrL 2091 (2d Cir. 1973); *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968).

Viewed in this backdrop, the record in the instant case reveals that the evidence against the respondent-defendant was substantial: he was discovered in an automobile with the victim in the early morning hours; a gun was found on the floor of the automobile in front of the seat on which the respondent-defendant had been sitting; he gave a false name to the investigating officer and gave a false identification of the victim and gave a false explanation of the circumstances of the victim's condition to the police (A. 16-20); he fled and remained concealed from the police for over a year (Tr. 724-727); medical testimony indicated that the victim had been shot in the automobile in which the victim and the defendant were discovered and that death occurred very shortly before the investigating officers stopped the automobile (A. 40, 43).

Further review of the proceedings as a whole indicates that the improper remarks occurred during a lengthy summation by the prosecutor following a provocative argument by defense counsel. Curative instructions were given by the trial judge in his charge to the jury (A. 143-144). In this context, the petitioner submits that the remarks of the prosecutor cannot be deemed to be so substantially and conspicuously prejudicial as to constitute a violation of the defendant's right to a fair trial.

In *United States* v. *White, supra*, the prosecutor stated that the defendant was "lying" and that the defense was "fabricated." In *Downie* v. *Burke, supra*, the prosecutor referred to the defendant as a "big ape" and a "gorilla." In *Castillo* v. *Fay, supra*, the prosecutor argued that, by their verdict, the jury would judge whether the principal

government witness, a police officer, was an "honest, faithful, courageous public servant" or a "liar." In each of these cases substantial prejudice requiring relief was not found.

By comparison, the remarks in the instant case were at most improper statements of the prosecutor's personal belief, and in the case of the second disputed remark, an ambiguous statement at best. The remarks do not, the petitioner submits, reach a level of prejudice which this Court has held to be violative of Due Process. Petitioner's research discloses two decisions by the Court which have reviewed the constitutional propriety of a federal prosecutor's remarks and conduct in a *federal* criminal proceeding: *Berger* v. *United States,* 295 U.S. 78 (1935) and *Viereck* v. *United States,* 318 U.S. 236, 247 (1943). In *Berger* this Court found that the record clearly showed that the prosecutor:

> ...was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner. 295 U.S. at 84.

To this continuing course of improper prosecutorial conduct, coupled with an "undignified and intemperate" argument to the jury, in the face of a weak case, this Court stated:

> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached... Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. 295 U.S. at *89*.

Nor do the remarks in the instant case reach the level of prejudice considered in *Viereck* v. *United States,* 318 U.S. 236, 247-248, (prosecutor's totally irrelevant appeal to passion and patriotism). The petitioner submits that the remarks in the instant case fall far short of the level of prejudice deemed by this Court to be violative of Due Process.

The First Circuit, in the instant case, stated, at least implicitly, that for a state prosecutor to convey, or even to permit, a false impression, invades the area of due process; citing *Miller* v. *Pate,* 386 U.S. 1 (1967) and *Hamric* v. *Bailey,* 386 F.2d 390 (4th Cir. 1967). The petitioner suggests that such reliance is misplaced, however, as both *Miller* and *Hamric* dealt with a deliberate and knowing misrepresentation of material evidence by the prosecutor and are, in petitioner's opinion, clearly and substantially distinguishable from the instant case.

In *Miller,* the prosecutor offered and the trial court allowed to be introduced into evidence the pants of an accused murderer and rapist. He introduced testimony that the pants were stained with the blood of the victim's blood type, well-knowing that the pants were, in fact, stained

with paint. Similarly, in *Hamric,* the prosecutor deliberately withheld evidence that was material to the defendant's claim of self-defense. Your petitioner suggests that the reliance by the Court of Appeals on these cases is misplaced in at least two respects.

First, there is absolutely nothing in the instant record to support the inference that the prosecutor deliberately or willfully misrepresented what he knew not to be true. After the hearing before the Court of Appeals, both parties stipulated that no offer to plead guilty had been offered (A. 235). By comparison, in *Hamric* and *Miller* the *record* indicated that there was in fact deliberate misrepresentation; in the instant case, the Court of Appeals has based its imputation of egregious misconduct only upon its surmise as to what the jury *might have inferred* from the prosecutor's remark.

Second, under the standards applied by this Court in *Miller* and the Fourth Circuit in *Hamric,* the remarks of the prosecutor in the instant case do not require reversal. The standards seem to be that in determining whether the false impression created by the prosecutor's misrepresentation reached constitutional standards requiring reversal, the misrepresentation or non-disclosure must be such as to materially affect the fact-finding process or to be material and capable of clearing or tending to clear the accused of guilt. *Miller* v. *Pate, supra; Hamric* v. *Bailey, supra.* See also, *Giles* v. *Maryland,* 386 U.S. 66 (1967). The petitioner submits that the ambiguous remarks at issue in this case do not approach the level of materiality considered in the cases relied upon by the Court of Appeals.

At most, the improper remark causes only a possible improper inference with respect to a collateral issue, and does not constitute a violation of the Due Process Clause of the Fourteenth Amendment.

C. *The Court Of Appeals Opinion Is Facially In Error.*

At the conclusion of a trial lasting several days and in the course of an extensive closing argument (A. 119-131) the prosecutor remarked:

> I am sure you will have no trouble at all reaching a verdict in this case. I don't know what they want you to do by way of a verdict. They said they hope that you will find him not guilty. I quite frankly think that they hope that you will find him guilty of something a little less than first degree murder. (A. 129).

It was concededly improper for the prosecutor to remark as to his personal belief. However, the statement on its face appears to be of little significance. The prosecutor first stated that he did not know what verdict the defendant wanted and then stated what he "thought" they might hope for. The petitioner suggests that, at most, it would appear that the prosecutor was arguing that the evidence presented at trial was sufficient to support a conviction for murder in the first degree and that the defendant, quite reasonably, was hoping for something less.

This Court has cautioned that a showing of essential unfairness must be sustained "not as a matter of speculation but as a demonstrable reality." *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943), quoting *Adams* v. *U. S. ex rel. McCann*, 317 U.S. 269, 281 (1942). Consistent with this stricture, the Massachusetts Supreme Judicial Court refused to conclude that the jury drew any "subtle inferences" (A. 157) from the statement.

The Court of Appeals, however, elevated the *possibility* of "subtle inferences" being drawn by the jury to the reality of an obvious conclusion requiring "little sophistication." Petitioner suggests that not only would it require

a good deal of sophistication for a jury of laymen to leap from the prosecutor's statement to a consideration of plea bargaining, but that an inference that the defendant had attempted to plead and the prosecution had refused the plea is illogical: The prosecutor acknowledged to the jury that Oreto and Gagliardi had fired the fatal shots (A. 123). The jury knew that co-defendant Gagliardi had pleaded guilty (A. 99). Accordingly, it makes no sense to infer that the prosecutor would accept a plea of guilty from a co-defendant who had shot the victim and refuse to accept a plea from another defendant who did not shoot the victim.

Defendant's trial strategy was to show DeChristoforo to be an "innocent bystander" to a murder. Counsel was careful to mention in his closing that Gagliardi had pleaded guilty to the murder of Lanzi (A. 107); counsel also adroitly attempted to convince the jury that the people pulling the triggers were Gagliardi and Oreto—not DeChristoforo (A. 106-110). The defendant made an unsworn statement alleging his innocent participation and subsequent fear. This statement was consistent with the defense counsel's efforts to show that the defendant's level of participation in the crime differed from that of the persons who actually fired the shots. If the jury were to consider anything in relation to a plea, would not the reasonable inference be that the defendant did not offer a plea because he hoped he would be believed?

D. *The Court Of Appeals Opinion Violates Principles Of Comity And Federalism Underlying The Federal Habeas Corpus Statute.*

By indulging in strained inferences to create *some* possibility of prejudice, the Court of Appeals has transformed an improper remark by the prosecution into a violation of the Due Process Clause of the Constitution, and we suggest

that the court has violated principles of comity and federalism which underlie the federal habeas corpus statute. It has long been recognized that:

> [t]he Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy *and fairness* unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental....
>
> Its procedure does not run afoul of the Fourteenth Amendment because another method may seem to... be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934); see also *Coggins* v. *O'Brien,* 188 F.2d 130 (1st Cir. 1951).

The case of *Castillo* v. *Fay, supra,* is illustrative of a situation wherein this distinction was of central importance. In *Fay,* although determining that certain remarks made by the prosecutor in his summation had been improper, the Second Circuit, nevertheless, held that the state error if any, in not granting a new trial fell short of constituting a deprivation of due process of law. 350 F.2d 400. See also *Higgins* v. *Wainwright,* 424 F.2d 177 (5th Cir.), *cert. denied,* 400 U.S. 905 (1970); *Downie* v. *Burke, supra;* and *Chavez* v. *Dickson, supra.* The rationale underlying decisions such as *Fay* is readily apparent. While it is highly proper for a federal court to vindicate rights under the federal constitution where it appears that such rights have been abridged, the concept of due process may not be used as a vehicle for imposing federally preferred procedural rules upon state tribunals. See *Snyder* v. *Massachusetts, supra; Coggins* v. *O'Brien, supra; Soulia v. O'Brien,* 94 F. Supp. 764 (D. Mass. 1950), *aff'd,* 188 F.2d 233, *cert. denied,* 341 U.S. 928 (1951).

Before the federal court should seek to impose its procedural standards on the state court a determination must be made as to whether the alleged error violates fundamental fairness.

> It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court intervention is warranted. *Chavez* v. *Dickson,* 280 F.2d at 735.

The question, then, is not merely whether an act has occurred that is unfair, but whether there is a conspicuous and substantial error which results in a *constitutionally* unfair trial.

The Court of Appeals in the instant case has taken an act of the prosecutor that may have interfered with the defendant's right to a fair trial and elevated it to a constitutional level by deeming the improper remark to be a violation of the Due Process Clause of the Constitution. However, this Court has limited the perimeters of a constitutionally unfair trial.

> ... [A]part from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in *Moore* v. *Dempsey,* [261 U.S. 86], that the proceeding is more a spectacle (*Rideau* v. *Louisiana,* 373 U.S. 723, 726) or trial by ordeal (*Brown* v. *Mississippi,* 297 U.S. 278, 285) than a disciplined contest, *United States* v. *Augenblick,* 393 U.S. 348, 356.

Traditionally this Court has sought to achieve a judicial balance between federal and state courts by requiring a showing of real prejudice before the federal court may intervene.

> The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic form through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis* v. *Parker,* 187 U.S. 606, 609, 47 L. ed. 323, 327, 23 S. Ct. 168), wherever the good life is a subject of concren. There is danger that the criminal law will be brought into contempt —that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free. *Snyder* v. *Mass.,* 291 U.S. 97, 124.

The petitioner submits that it is just such a "gossamer" possibility of prejudice that the Court of Appeals has held to require a new trial in this case.

No one contends that the Massachusetts Supreme Judicial Court used an incorrect legal standard in determining that DeChristoforo had received a constitutionally fair trial. That Court applied the proper legal principles to the facts before it.[5] Of course, it is recognized that, in a

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[5] The Massachusetts Court properly considered the entire record in making its decision, this consideration included the weight of the evidence against the accused, the context in which the remark was made, the provocation of the defense counsel and the curative instructions by the trial judge to the jury in his final charge.

Massachusetts law does not require reversal where otherwise improper remarks by the prosecuting attorney are made in response to provocative remarks by the defense counsel. Where defense counsel strongly criticized the F.B.I., the prosecutor was permitted to praise

federal habeas corpus proceeding, federal court judges are not bound by conclusions of state courts on questions of federal constitutional law—even where the facts are not in dispute. Nevertheless, the notions of comity and "federalism" that permeate the federal habeas corpus statute

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the organization. *Commonwealth* v. *Geagan*, 339 Mass. 487, 516 (1959). Where defense counsel directed the attention of the jury to the prosecution's failure to produce the defendant's prior criminal record for impeachment purposes, the prosecutor was allowed to argue that the absence of such a record did not mean that the record did not exist. *Commonwealth* v. *Smith*, 342 Mass. 180, 185-186 (1961). In *Commonwealth* v. *Perry*, 254 Mass. 520 (1926), the Supreme Judicial Court stated:

> The expressions of personal opinion were an answer to the challenge of the argument for the defendant, they were directed to that argument and they were accompanied by declarations that the jury were to consider the evidence without regard to the opinions and feelings of the speaker.
>
> Language ought not to be permitted which is calculated by abusive epithets, vehement statements of personal opinion, or appeals to prejudice, to sweep jurors beyond a fair and calm consideration of the evidence. *Much, however, must be left to the discretion of the judge who has seen and heard the innumerable incidents of a trial where men are contending earnestly.* 254 Mass. at 530-31 (Emphasis added.)

While the First Circuit has found unpersuasive the argument that provocation by defense counsel may justify retaliatory expression of personal belief by the prosecution, *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), *cert. den.*, 393 U.S. 1022 (1969), the Court of Appeals did suggest that "serious provocation would be weighed as a factor in evaluating possible prejudice." 404 F.2d at 321. Moreover, *Patriarca* involved procedure in the lower federal court which is subject to the supervision of the Federal Court of Appeals. However, the initial question in the instant case is whether, as a matter of Massachusetts law, the remarks required reversal. If they did not, the question becomes whether or not they deprived the defendant of his constitutional right to a fair trial under some more rigorous standard of Due Process.

The Supreme Judicial Court held that under Massachusetts law the prosecutor's remarks were improper statements of personal belief. *Commonwealth* v. *Cooper*, 264 Mass. 368 (1928); *Commonwealth* v. *Mercier*, 257 Mass. 353 (1926). However, "... it is not every impropriety that occurs in a trial that requires reversal." *Commonwealth* v. *Bottiglio*, 357 Mass. 593, 598 (1970). The entire record must be and was considered in order to ascertain whether the

would seem to demand that in the circumstances of this case some deference be given to the opinion of the Supreme Judicial Court. *Cf. United States ex rel. Harris* v. *State of Illinois*, 457 F.2d 191, 197 (7th Cir. 1972). This is

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impropriety was "unfair, prejudicial and unwarranted" or did it so appeal to passion or so abuse the defendant as to warrant the belief that prejudice resulted. *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 27-28 (1923). The Supreme Judicial Court, quoting from *People* v. *Kingston*, 8 N.Y.2d 384, 387 stated the test as follows, ". . . whether the claimed defect influenced the jury and tainted its verdict. If the record demonstrates that it did not, then the defendant is not entitled to a new trial." *Commonwealth* v. *Bottiglio*, 357 Mass. 593, 598 (1970).

It is well settled that improper remarks by counsel may be cured by an appropriate instruction to the jury. *Commonwealth* v. *Balakin*, 356 Mass. 547 (1969); *Commonwealth* v. *Stout*, 356 Mass. 237 (1969); *Commonwealth* v. *Mercier*, 257 Mass. 353 (1926). Such curative instructions have, of course, been utilized and, depending upon the circumstances of the case, been deemed to be adequate, not only in Massachusetts courts but in the federal courts as well. See *Baiocchi* v. *United States*, 333 F.2d 32, 38 (5th Cir. 1964); *Homan* v. *United States*, 279 F.2d 767 (8th Cir.), *cert. denied*, 364 U.S. 866 (1966); *Painten* v. *Commonwealth*, 252 F.Supp. 851 (D. Mass. 1966).

The instructions given by the trial judge in the instant case were completely adequate to remove any residual prejudicial effect of the prosecutor's remarks. With respect to the remarks made by the prosecutor during his closing argument, the trial judge emphasized that such arguments were not evidence (A. 142-144). He explicitly directed the jurors to disregard the prosecutor's second disputed remark and to "[c]onsider the case as though no such statement was made" (A. 143-144); this second remark was the only comment which had been objected to immediately by respondent's counsel. On appeal, the Supreme Judicial Court noted that it was quite satisfied with the trial judge's decision to rely on curative instructions to erase any impropriety. The Court held that "[t]he judge adequately guarded the defendant's rights in each instance." 1971 Mass. Adv. Sh. at 1712-1713 (A. 154-155).

Finally, as the Supreme Judicial Court noted, when counsel for the respondent objected immediately after the prosecutor's second disputed remark, the objection was in effect sustained. *Id.* at 1712. (A. 155). Later, the trial judge "explicitly stated that he would have given immediate instruction to the jury to disregard the comment if defense counsel had asked for one." *Id.* However, no such motion was made. Additionally, no objection was made immediately after

certainly the position expressed by Circuit Judge Campbell in his dissent (A. 243).

But the majority of the Court of Appeals were obviously unwilling to grant any substantial consideration to the opinion of the Supreme Judicial Court. The petitioner suggests that the majority of the Court of Appeals strained in constructing a doubt about the fairness of respondent's trial. The petitioner suggests that the Court of Appeals has attempted to extend its general federal court supervisory power over the state court. And, your petitioner suggests that such a procedure would result in transforming the federal court's traditional habeas corpus power into that of a court of appellate review—a result contrary to the history of the writ. *Townsend* v. *Sain, supra.* And, the petitioner suggests further that the Court of Appeals has ignored the good faith allegiance that state court judges pledge to a vigorous enforcement of the United States Constitution—even in their own courts.

Conclusion

For the reasons stated above the petitioner respectfully requests this Court to remand the case to the First Circuit Court of Appeals with directions to reverse its order granting the writ and to direct the Court of Appeals to

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the prosecutor's third disputed remark and no curative instruction was requested at that time.

Thus, when viewed in the context of the entire case, the petitioner suggests that the remarks were not calculated to arouse the passion of the jurors nor to prejudice them against the defendant; the remarks were no more prejudicial than those involved in the *Smith*, *Perry* and *Geagan* cases, *supra*, and the Massachusetts Supreme Judicial Court properly found that they were not so significantly prejudicial as to require reversal.

reinstate the order of the District Court denying the respondent's petition for a Writ of Habeas Corpus.

Respectfully submitted,

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